IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2008 Session

# RICHARD L. HARMON and LOIS HARMON v. E.G. MEEK, SR., and LOUIS HOFFERBERT, TRUSTEE

**Direct Appeal from the Chancery Court for Knox County**
**No. 06-167469-2 Hon. Daryl Fansler, Chancellor**

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**No. E2007-01168-COA-R3-CV - FILED APRIL 4, 2008**

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Plaintiffs executed a promissory note and trust deed on their property to a third party who subsequently began foreclosure proceedings on the property. Defendant purchased the note and trust deed from the third party and subsequently began foreclosure proceedings on the property which became the genesis of this action. Plaintiffs asked the Court to enjoin the foreclosure and the foreclosure was stayed by agreement. After prolonged negotiations between the parties, plaintiffs were finally able to sell the property to another third party. Plaintiffs charged defendant with violations of the Tennessee Consumer Protection Act and the Trial Court awarded damages and attorney's fees, finding defendant had violated the Act in his dealings with the plaintiffs. On appeal, we affirm.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.**

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Michael J. Stanuszek, Knoxville, Tennessee, for appellant, E.G. Meek, Sr.

Donald K. Vowell, Knoxville, Tennessee, for appellees.

## OPINION

This is an appeal from the Chancery Court of Knox County, where the Chancellor awarded plaintiffs/appellees damages of $5,500.00 and attorney's fees plus expenses against defendant/appellant E. G. Meek, Senior for violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. §47-18-101 *et seq.* (TCPA).

Plaintiffs brought this action to Enjoin Foreclosure Sale and for Other Relief against E. G. Meek and Louis Hofferbert, Trustee[1] for the immediate purpose of enjoining a foreclosure sale scheduled to take place on July 25, 2006. Plaintiffs, mother and son, each had a one half interest in a parcel of real estate and had executed a promissory note and a deed of trust securing the note, which was held by Meek, who had started foreclosure proceedings on the property. The Complaint alleged that Meek had failed to give proper notice of the acceleration of the note as required by both the note and the deed of trust, and that plaintiffs had entered into a contract of the sale of the property and had demanded the payoff amount on the promissory note from Meek. After a significant delay in providing the figure to the plaintiffs, Meek provided what the plaintiffs characterized as an inflated payoff on the note. Meek then refused to provide the plaintiffs with a breakdown or calculation of the payoff amount and began the foreclosure proceedings. Plaintiffs also asked the Court to order Meek to provide a detailed written payoff showing the breakdown and calculation of the claimed payoff amount and to award them damages, attorneys fees and expenses, pursuant to TCPA for deceptive or unfair acts or practices.

Subsequently the parties agreed on the entry of an Order cancelling the foreclosure sale, and the Order stated that the plaintiffs had a contract to sell the property at issue for $275,000, and the parties agreed that plaintiffs could proceed with the act of sale of the property and the proceeds of the sale be distributed as follows: $150,161.45 to Meek as part of the payoff of the promissory note; $42,051.95 (the payoff amount in controversy) to the Clerk and Master to be held at interest subject to the further Order of the Court; as well as an additional $8,000 to be held as interest, and the balance of $74,786.60 to be paid to the plaintiffs.

The plaintiffs were not able to effect the sale with the buyer, following the hearing, as contemplated by the Agreed Order because Meek refused to execute the release of the deed of trust as he "wasn't going to get all my money." Another hearing was conducted and the Court ordered Meek to execute the release of the deed of trust as part of the closing of the sale of the property, and at Meek's insistence, the Court ordered that an additional $15,000 be paid to the Clerk and Master from the proceeds of the sale until all the issues were determined.

Meek then answered the Complaint and filed a Counter-Complaint, denying that the TCPA was applicable and that he was "never engaged in the business of buying and selling

[1] Mr. Hofferbert was named a defendant only in his capacity as Trustee of the Deed of Trust in question and not in his individual capacity.

commercial paper" and that the purchase of the plaintiffs' note was an isolated transaction. He further contended that plaintiffs had not paid on the note since he became the holder and that they were in "serious default" when he began foreclosure proceedings. Further, that he was never advised that the plaintiffs had a buyer for the property.

Plaintiffs answered the Counter-Complaint, stating that Meek was in the business of buying and selling commercial paper and the transaction at issue was made for the purposes of profiting as part of his ordinary business activities. They stated that Meek did business as a real estate broker, auctioneer and debt settler under the business names of both GM Properties & Auction Co. and Debt Settlers of Tennessee.

The case was tried before the Chancellor on January 24 and 25, 2007. Following the evidentiary hearing, the Chancellor ruled that the correct balance due on the promissory note from the plaintiffs to Meek on the date of the sale of the property was $179,539.13; that the Tennessee Consumer Protection Act applies to the facts of the case; and that Meek's actions in failing and refusing to provide a correct and proper payoff balance to plaintiffs were unfair and deceptive acts or practices affecting the conduct of trade or commerce in the State. Further that plaintiffs suffered an ascertainable loss of money or property in the amount of $5,500 as a result of these unfair or deceptive acts or practices, but the Court declined to award treble damages. The Court also awarded plaintiffs reasonable attorney's fees and expenses under the authority of TCPA, and held that the funds on deposit with the Clerk and Master would be distributed into the account with accrued interest and the damages of $5,500 due to plaintiffs: Meek - $24,069.68, and plaintiffs - $41,409.82. The claims against the Trustee and the Counter-Claim were dismissed.

The Trial Court, in its Opinion, held that Meek's testimony on critical issues was not credible and observed: "primarily . . . [the] case [is] driven by the facts and the credibility of the witnesses presenting those facts", and cited at least six examples where Meek's testimony was "odd", "baffling", puzzling or was simply not believable. The Court found that Meek did not give proper notice of the acceleration of the note, and that Meek's testimony that he was not very involved in his business "Debt Settlers" was not credible. The Court held Meek was involved in this business and that he was in the debt settlers business, and based on the Yellow Pages advertisement for Debt Settlers, that the company held itself out to the public as being in the business of buying notes and mortgages. Further, the Court said Meek bought the promissory note in an effort to make money and not out of friendship with plaintiff as Meek contended. The Court said that Meek's testimony that he had actually responded to the plaintiffs' request for the payoff amount was not credible. The Court said it believed the testimony of the prospective purchaser that he would have purchased the property on April 26, 2006 if he had been provided with the payoff information, and that the sale of the property would have occurred long before the date it actually sold. The Court awarded $5,500 damages for this delay, which roughly accounts for the accrual of extra interest.

Both parties filed Motions post-judgment, which came on for hearing on April 16, 2007. The Motion to Alter or Amend filed by Meek was denied. Plaintiffs' Motion for Attorney's Fees and Expenses was granted and $24,766.85 for services rendered and costs were awarded.

**Issued Raised on Appeal**[2]

A. Whether the Tennessee Consumer Protection Act provided a cause of action under which plaintiffs/appellees could recover damages and attorney's fees and expenses?

B. Whether the defendant/appellant engaged in unfair or deceptive acts or practices under the Tennessee Consumer Protection Act?

C. Whether plaintiffs/appellees should be awarded reasonable attorney's fees and expenses in connection with this appeal under the Tennessee Consumer Protection Act?

A trial court's findings of fact in a non-jury trial are reviewed *de novo* upon the record. The trial court is afforded a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13 (d); *Wright v. City of Knoxville,* 898 S.W.2d 177, 181 (Tenn. 1995). The trial judge in a non-jury case is in the best position to assess the credibility of the witnesses, and appellate court gives great weight to the trial court's determination of the witnesses credibility. *Randolph v. Randolph,* 937 S.W.2d 815, 819 (Tenn. 1996), *Estate of Walton v. Young*, 950 S.W. 2d 956, 959 (Tenn. 1997). The scope of review for questions of law is *de novo* upon the record of the trial court with no presumption of correctness. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993).

The issue of whether the Tennessee Consumer Protection Act applies to the facts of this case is a question of law. *Beare Co. v. Tennessee Dept. of Revenue,* 858 S.W.2d 906, 907 (Tenn.1993). In construing the statute, we must ascertain and give effect to the legislative intent and the ordinary meaning of the language of the statute. *Carson Creek Vacation Resorts, Inc. v. Dept. of Revenue,* 865 S.W.2d 1, 2 (Tenn.1993). The Court must also bear in mind that the Tennessee Consumer Protection Act "is to be liberally construed to protect consumers and others from those who engage in deceptive acts or practices." *Morris v. Mack's Used Cars,* 824 S.W.2d 538, 540 (Tenn. 1992); Tenn. Code Ann. § 47-18-102(2) (1995).

The TCPA was enacted "to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce . . ., [t]o encourage and promote the development of fair consumer practices; [and] . . . [t]o declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state . . .." Tenn. Code Ann. § 47-18-102. Recovery under the Act is not limited to fraudulent or willful acts; it also contemplates recovery for negligent conduct. *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992).

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[2] The Trial Court's findings regarding the amount of monetary damages sustained by the plaintiffs and the amount of the payoff on the note were not appealed.

In order to recover, the plaintiffs were required to show that Meek engaged in an unfair or deceptive act or practice declared unlawful by the TCPA, and that his conduct caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated . . . ." Tenn. Code Ann. § 47-18-109(a)(1). The defendant's conduct need not be willful or even knowing, but if it is, the TCPA permits the trial court to award treble damages. Tenn. Code Ann. § 47-18-109(a)(3); *Fleming v. Murphy,* No. W2006-00701-COA-R3-CV, 2007 WL 2050930 at *9(Tenn. Ct. App. Jul. 19, 2007).

Meek argues that he simply sought to foreclose on the note which was in default, and contends that under these circumstances plaintiffs were not "consumers" as defined and applied under the Act, nor did his activities affect the conduct of "trade or commerce".

A "consumer" is defined by the Act as "any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated . . . " Tenn. Code Ann. § 47-18-103(2).

The Act defines "trade, commerce or consumer transaction" as "the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated." Tenn. Code Ann. 47-18-103(11).

In this case, plaintiffs argue that they were damaged by Meek in several ways: by the delay in response to their request for a payoff on the note; by the inflated payoff figure and Meek's refusal to provide a breakdown of that figure and his failure to provide proper notice before accelerating the note. The Act lists forty-four examples of acts or practices that are prohibited because they are deemed to be unfair or deceptive. The enumerated practices are not meant to be exclusive. *See Gaston v. Tennessee Farmers Mut. Ins. Co.* No. E2006-01103-COA-R3-CV, 2007 WL 1775967 at *11 (Tenn. Ct. App. Jun. 21, 2007). The Act provides that engaging in the business of "debt adjusting" under certain circumstances qualifies as an unfair or deceptive practice under the Act. "Debt adjusting" is defined as:

> "[D]oing business in debt adjusting, budget counseling, debt management, or debt pooling service or holding oneself out, by words of similar import, as providing services to debtors in the management of their debts to do any of the following:
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> (I) Effect the adjustment, compromise, or discharge of any account, note or other indebtedness of the debtor;
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> (ii) Receive from the debtor and disburse to the debtor's creditors any money or other

thing of value; or

(iii) Solicit business and advertise as a debt adjuster.

Tenn. Code Ann. § 47-18-104(b)(39)(C).

As the Trial Court held, Meek was acting as a debt adjuster as defined by the Act at the time the Harmons' complaints arose. His purchase of the note from Interbay falls within the definition provided in section (39)(C)(I) as his purchase effected the "discharge of . . . [a] note . . . of the debtor." His actions also fit the definition of debt adjuster under section (39)(C)(iii) as his advertisement in the Yellow Pages for Debt Settlers of Tennessee offered services such as buying notes and other assignable receivables and debt mitigation and counseling. The Trial Court held that Meek's assistance to the Harmon's involved the debt settlers business and that, based on the Yellow Pages advertisement for Debt Settlers, his company held itself out to the public as being in the business of buying notes and mortgages. The Trial Court specifically found that Meek's insistence that his transaction with the plaintiffs was separate and apart from his business was not believable. Based upon a review of the facts and on the deference this Court allows to a trial court's judgment on the credibility of witnesses, the evidence does not preponderate against the Trial Court's findings on this issue, as Meek was acting as a debt settler or debt adjuster at the time the plaintiffs' complaints arose, and, the provisions of the TCPA, applies to a person who is performing the services of a debt adjuster such as Meek.

Section (39)(A) enumerates eight specific unfair or deceptive acts by a debt adjuster that are "declared unlawful and in violation" of the Act. Meek's complained of activity is not set forth in the listed acts.[3] Deceptive acts set forth in section 104(b) are not exclusive and the section provides a catch-all provision that prohibits "engaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn. Code Ann. § 47-18-104(b)(27). Accordingly, plaintiffs have a cause of action against a debt adjuster, if under the TCPA, his actions as a debt adjuster are found to be unfair or deceptive and the plaintiffs are found to be consumers.

The provisions of section 47-18-104(b)(39)(A) contemplate that a debtor who is receiving the services of a professional debt adjuster is a consumer under the TCPA. Moreover, the plaintiffs are consumers under the evidence presented. The plaintiffs, by agreeing to Meek's offer of assistance in preventing the Interbay foreclosure and by allowing him to pursue the purchase of the note from Interbay, became consumers of Meek's debt assistance services. Meek has argued that

[3] The listed unfair or deceptive acts include delay in disbursing funds to creditors; not maintaining a trust account; various violations regarding fees collected from debtors; failing to maintain appropriate insurance policies and; failing to provide certain disclosures to the debtors.

the plaintiffs were not buyers as defined by the Act, but we do not agree. Plaintiffs purchased Meek's debt settling services at a high price, i.e., the interest owed on the promissory note. In fact, according to Meek's Response to Interrogatories the interest accrued between the date he purchased the note on February 3, 2005 and August 16, 2006, the date of the payoff, was $28,029.42. Accordingly, Meek was paid well for his services to the plaintiffs.

We agree with the Trial Court who held that Meek's delay in providing the payoff balance on the note and the inflation of the balance once he was compelled to provide it were unfair acts that affected commerce. The standards for determining whether a particular act or practice is unfair or deceptive are issues of law, while a determination of whether a particular act or practice is unfair or deceptive is a question of fact. *Tucker v. Sierra Builders,* 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005). *Tucker* provided guidance regarding standards that should be employed when making such a determination. An act is deceptive if it causes or tends to cause a consumer to believe something that is false or that misleads or tends to mislead a consumer with regard to a matter of fact. An act is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoided by the consumers themselves." *Tucker,* 180 S.W.3d at 116 - 117. An injury is "substantial," if it is more than trivial or speculative. *Id.* at 117. "Consumer injury will be considered substantial if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers". *Id.* (citing *Orkin Exterminating Co. v. FTC,* 849 F.2d 1354, 1365 (11th Cir.1988)).

In this case Meek's misrepresentation of the payoff balance was a deceptive act as it was a false statement regarding a matter of fact. His delay in providing the payoff balance and then his refusal to produce the backup calculations until after this action was filed falls within the standard of an unfair act as it caused substantial injury to the plaintiffs. As we have noted, the Trial Court found the injury sustained by the plaintiffs was $5,500 in interest that accrued between the time the plaintiffs could have sold the property to the date they were able to sell it.

Finally, Meek argues that no one ever told him that the plaintiffs had a buyer for the property and, had he known of the sales agreement, he would have provided the payoff balance immediately. The Trial Court, rejected his testimony, and in support of his finding, the Chancellor referenced Leedom's[4] letters of April 27th and May 12th and also Leedom's letter to Mr. Searle of May 5th, which contained a clear statement that the plaintiffs needed the payoff because they were selling the property. Based on the Leedom letters to Meek, the Trial Court did not believe Meek's testimony. Moreover, the Trial Court did not accept Meek's testimony that Mr. Searle had not told him about the May 5th Leedom letter, and observed that even if Meek had not been informed by Mr. Searle of the contents of the letter, Mr. Searle's knowledge, as Meek's attorney, was imputed to Meek. We agree with this conclusion. *See, Kentucky Nat. Ins. Co. v. Gardner,* 6 S.W.3d 493, 498

[4]Mark Leedom, an attorney, was asked by the third party purchaser to obtain the payoff amount.

(Tenn. App.1999)(Holding that the actions and knowledge of an attorney is imputed to the client).

Meek also appeals the Trial Court's award of attorney's fees to the plaintiffs, but TCPA provides for an award of reasonable attorney's fees "upon a finding by the court that a provision of this part has been violated. Tenn. Code Ann. § 47-18-109(e). We conclude the award of attorney's fees by the Trial Court to plaintiffs was not an error.

Finally, plaintiffs have requested an award of attorney's fees associated with defending this appeal. The Supreme Court has held that a plaintiff may be awarded reasonable attorney's fees incurred during an appeal on a claim brought pursuant to the TCPA when there is a finding that the TCPA has been violated. *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410 (Tenn. 2006). The Court noted that TCPA's provision regarding the award of attorney's fees does not limit the award to fees incurred at the trial level. *Id.* at 410. The rational for such an award as expressed is that " the wronged plaintiffs' monetary judgment is at risk of being consumed by the resulting appellate attorney's fees unless they are also subject to being awarded. *See Killingsworth* at 410 (citing *Miller v. United Automax,* 166 S.W.3d 692, 697 (Tenn. 2005). We affirm the Trial Court's holding that the Tennessee Consumer Protection Act was violated by Meek and hold that plaintiffs should be awarded reasonable attorney's fees in connection with defending their recovery on this appeal. Upon remand, the Trial Court will determine a reasonable attorney's fee to be awarded as an additional judgment against Meek.

The cost of the appeal is assessed to defendant, E.G. Meek, Sr.

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HERSCHEL PICKENS FRANKS, P.J.